tirety, and all its terms are presumed to be incorporated in the articles, signed and sealed by the parties. In the absence of fraud or mistake, this presumption is a conclusive one.

The other errors assigned were abandoned upon the argument.

Decree affirmed, and it is ordered that the appellant pay the costs which have accrued upon the appeal.

In the Supreme Court of Pennsylvania.

Error to Allegheny County District Court.

PENNSYLVANIA RAILROAD COMPANY *vs.* M'CLOSKEY'S ADM'R.

1. The jury in estimating damages under the Act of April 15, 1851, may take into consideration the age, habits, health, and pursuits of the deceased. The measure of damages is the absolute value of the life lost, measured according to its own merits, and not according to the necessities of the kindred.
2. The principle that allows an action for death of a freeman caused by negligence discussed and re-stated.
3. The personal representatives may continue an action commenced under the statute, and recover the very damages to which deceased would have been entitled, had he survived until verdict.

The case was argued by

Wm. A. Stokes, Esq., for the plaintiff in error.

Messrs. *Shaler & Stanton* for defendant in error.

The opinion of the Court was delivered by

LOWRIE, J.—William McCloskey lost his life in a collision of trains on the Pennsylvania Railroad, and his administrator brings suit for the injury, and the question which we have to consider is the measure of damages appropriate to such a case.

The learned Judge of the Court below allowed the jury to find the damages according to the value of the life lost, and suggested that, in estimating them, they might compute them by the probable accumulations of a man of such age, habits, health and pursuits as the deceased during what would probably have been his lifetime; and then added "I think this would be a fair measure of damages in this case; but if the jury can find a better rule than the one suggested, they are at liberty to adopt it."

To this it is objected that it gives to the representatives of the deceased more than compensation, that is, more damages than they

have suffered by the death; and that thus the judgment acquires a punitive character, which, it is said, could not have been intended; since the law has manifested its punitive will in a different form, by providing for the punishment of the really guilty persons, the servants of the company, in the Act of 1st April, 1836.

The latter part of this argument is answered by saying that there are many cases in which vindictive damages are given, though the act is also subject to punishment, and this is a denial of the unexpressed premise of the argument, and therefore the conclusion is left without support; and we are saved the necessity of showing that it is a mere assumption to call such damages punitive. Besides this, we cannot say that a statute, providing for the punishment of "gross negligence" or "wilful misconduct," covers the very ground on which this case rests.

The main purpose of the argument, however, is to show that the representatives appointed by the law in such a case, are entitled to no more damages than they have individually sustained, and this requires a more extended consideration.

Heretofore no action has been allowed, among us, for the death of a freeman, and the novelty of the case contributes to the difficulty of determining it, and warns us to proceed with appropriate caution. But strange as the case is in our jurisprudence, we are not without analogies here and elsewhere, which may furnish us some light.

The principle that requires compensation for the death of a freeman is not at all new in history. It was long an institution among our Anglo-Saxon ancestors, and perhaps it was never positively abolished, but rather died out under the influence of the Norman conquest, and the centralizing power of the King's Courts, which treated all such wrongs as wrongs done to the King, and hence criminal offences. It seems to have been an institution common to all the Germanic nations, and perhaps to every people that rose one degree above the savage life, and were still striving to rise. With them it was intended as a compensation to surviving kindred, and as a means of preventing the disorders that follow in the train of private revenge.

There are indications of its existence among the Romans, (Dig. 9, 2, 7, 4, also 9, 2, 9, and 31,) though Pasquier (Institutes de Justinian, 4, 3,) expresses doubts about it. Voet (Pandects. 9, 2, 11,) and Pacius (Analysis Institutionum, 4, 3, 1,) refer to it as existing there and also in Holland, Netherlands, and perhaps in some other parts of modern Europe, and we have evidence of its existence in Scotland. Erskine's Inst. 592 n. 13. Bell's Principles of Law, 749; 10 Eng. L. and Eq. R, 437; as it existed among the Romans, the damages recovered by the kindred were not by way of hereditary succession; for damages for wrongs done to the body of a freeman were not allowed to pass that way. Dig. 9, 3, 5, 5; Pothier's Pand. 9, 3, 12.

A recent English statute, 9 and 10 Vict. c. 93, seems to have revived the principle of the old Saxon law, and to allow the relations of the deceased to recover damages, to be apportioned among them according to the injury resulting to them respectively. In form, therefore, the action is for their own loss, and not a survival of the right of action for the injury to the deceased. Yet the English Courts have not known how to estimate the damages, except according to the value of the life lost. 10 Eng. L. and Eq. Rep. 437; *Armsworth* vs. *S. E. Railway Co.*, 11 Jurist, 758; 6 Harr. Dig. 273. And this statute seems to leave other injuries to the person just as they were before, and consequently a death from another cause before compensation recovered, is not provided for.

But it is asked, how can one that is dead be compensated by a civil procedure, for injuries done to him in his life, and especially for the loss of his life? This directs us to another aspect of the present claim that is not so new as the other.

In the early stages of our law, all rights of action for wrongs done, not breaches of contract, died with the injured person. This, however, was altered by statute 4 Ed. 3, c. 7, and this alteration has been very largely extended by construction; and by our statute 24th Feb'y, 1834, § 28, nothing was excepted but slander, libel and wrongs to the person. Many of the cases thus declared to survive, involve questions of compensation and exemplary damages for wrong and insult, fraud and malice, which are to be decided upon

and executed after the injured party is beyond the reach of civil compensation, and yet the injury is measured just as if he were still living.

There are abundant indications of the same law of survivorship in the Roman law in regard to such injuries. Inst. 4, 12, 1; Dig. 44, 7, 26 and 58; Dig. 50, 17, 139 and 164; Heineccius Elementa Juris. ss. 1193, 1194; Pacius Analysis Inst. 4, 12. And these embrace a wider range of injuries than have been heretofore saved from death by our law; for they include all cases actually commenced in the lifetime of the injured party, and prevent their abatement by his death.

Our Act of 15th April, 1851[1], seems to express its purpose better than the English one before referred to; for in one section, it simply provides that the action commenced for injuries to the person shall not abate by the plaintiff's death, but shall survive by substitution of his personal representatives; and in another, that if no suit for damages be brought during life by a party mortally injured by negligence or violence, then the widow, and if there be no widow, the personal representatives, may maintain an action for damages for the death.

The first of these sections is very plain, and it provides that the personal representative may continue the action commenced; that is, may proceed and recover the very damages to which the deceased would have been entitled had he survived until verdict and judgment.

The other section is somewhat less definite in regard to the damages intended; but this very indefiniteness is proof that no

[1] Our Act is as follows:

"That no action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

"That whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned."—P. L., p. 674.

other thought was in the mind of the Legislature than the wrong and damage done to the decedent; else it would have been made to appear. If one section related to damages done to the deceased, and the other to damages done to his relatives, these contrasted thoughts could hardly have failed to come out clearly in the expression.

But even if this were otherwise, we do not perceive how it could influence the damages; for they must necessarily be measured by the absolute value of the life lost, and not by the pecuniary loss which the designated representatives shall have thereby sustained. The precept involved in the law is, thou shalt not by negligence or violence take away the life of another, and the sanction of the law lies in the duty of compensation for the life destroyed, measured according to its own merits, and not according to the necessities and circumstances of his kindred. It is very hard to value: but not, for that, more uncertain than the speculations in relation to damages to kindred, which are proposed in its stead.

This thought is involved in the whole course of legislation and jurisprudence already referred to; and is a rejection of the idea that the negligence which destroys life is irresponsible, and an assertion of the principle that all negligence must answer for its results, however serious. We have not, heretofore, been startled at the absurdity of giving a pecuniary compensation for broken limbs, or ruined health, or shattered intellect, or tarnished reputation. If the body be all crushed, we have regarded its sufferings as a subject of civil compensation so long as life smoulders beneath the ruins; even though there be no capacity to appreciate or enjoy compensation. We ought not to be startled that the duty of compensation is continued when such a life is smothered out.

We call it compensation, while we admit that money is a very insufficient and uncertain measure of all such injuries. But it is the best standard we have, and in practice it is not found to be absurd. The duty of the wrong-doer to make compensation is very plain, and such as he has which the law can reach, it compels him to give; though it may never reach the consciousness of the person injured. It is an act of distributive justice in vindication of invaded

rights, and it adopts the best approximation to compensation which the authority of the law can enforce. And in these times, when criminal justice is so much out of repute, and police officers are held up to public scorn for their diligence, it is found to operate well. Call it punitive; yet it is only indirectly so, as all compensation is, and does not wipe out any offence that it involves against the State.

From our present experience and observation, therefore, we are unable to discover any substantial error in the instructions complained of. It would be wrong to value a man's life by his probable accumulations, for most of men make none in a life-time, and many have arrived at an age when they no longer attempt to make any, and many women never make any, and yet every one is entitled to his life, and we have as yet discovered no standard for its valuation. It is not human possessions that are destroyed, but humanity itself; and as this has no market value, it must necessarily be very much a matter of human feelings.

Hard, then, as the task may be, and however uncertain its results, it is to be performed by the jury, aided by the cautions and counsels of the judge, who has been trained in the consideration of juridical questions.

Looking, on the one hand, to the dignity of human nature as it has been assailed; and on the other, to the position and rights of the defendant, and considering the dignity of their own position as judges of most sacred rights, and their own dignity and responsibility as individuals, and loving mercy even while doing justice, the jury must place a money value upon the life of a fellow-being, very much as they would upon his health or reputation.

The other points in this cause, we feel compelled to dispose of in a few brief propositions.

A railroad company, carrying passengers, cannot allege that a passenger is in fault in obeying specific instructions of the conductor, instead of the general directions of which he has been informed.

Assuming that a public company of carriers may contract for other exemptions from liability than those allowed by law, still

such a contract will not exempt them from liability for gross negligence.

A regulation by which a passenger with live stock on the freight train is required to remain in the cars which contain his stock, is not so transgressed, by his being on another part of the train when it is at rest, as to make him a contributor to his own injury, by that train being run into by another.

Judgment affirmed.

In the City Court of New York.

THE PEOPLE *vs.* HERMAN RISTENBATT.

1. When a prisoner has been indicted by the Grand Jury upon evidence which appeared solely by affidavits accompanying the indictment and agreed to be read, and the facts in which were conceded to exhibit no legal evidence whatever, of the violation of a statute concerning false pretences, the Court will quash the indictment.
2. Indictment defined, and authorities for definition cited.
3. The Grand Jury is without authority to indict for want of jurisdiction of the subject matter, except upon sworn legal testimony, duly taken before a constituted authority.
4. If there is any legal proof of the offence charged, no matter how little, the Court will not quash the indictment, but will send it for trial to a petit jury.

This was a motion to quash the indictment against the prisoner for obtaining money under false pretences. The sole testimony before the grand jury consisted of certain affidavits, which failed to exhibit any legal evidence of the perpetration of the crime charged. And on this ground, the motion to quash the indictment which the Grand Inquest had found, was made.

The opinion of the Court was delivered by

STEWART, J.—The defendant is before the court upon two indictments for false pretences. Counsel for the accused moves to quash both indictments, upon the ground that they were found without any proofs of the commission of the offences preferred. On the argument of the case by Mr. Graham for the prisoner, and the District